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No. 82-86

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION,
Petitioner

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

This case involves an appeal by the Interstate Commerce Commission of various decisions of the court of appeals: (1) holding that policy statements purporting to implement provisions of the Motor Carrier Act of 1980 (the 1980 Act)[1] were in fact rules which in large measure exceeded the bounds of the Commission's statutory authority; and (2) issuing a writ of mandamus enforcing its prior opinion. The court's initial decision was rendered on October 1, 1981 and subsequently corrected on October 23, 1981. In January 1982, the Commission voted not to seek further review of the court's decision.

Following the Commission's apparent refusal to comply with the court's remand, petitioners below in January 1982 filed a petition for enforcement of the court's

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[1] Pub. L. No. 96-296, 94 Stat. 793.

previously issued mandate. The Commission vigorously opposed this effort indicating that it objected to any relief.[2] By decision issued February 25, 1982, the court of appeals granted petitioners below prospective relief in the form of a writ of mandamus (Pet. App. 63a-81a). Subsequently, the court refused to inject itself into the Commission's disposition of past individual licensing proceedings after the October decision (Pet. App. 89a-98a).[3]

The writ became effective March 8, 1982.[4] Thereafter, the Commission sought a stay of the writ pending the filing of a petition for a writ of certiorari. The stay was denied by the court of appeals (Pet. App. 83a-84a). After noting that the Commission had failed to seek rehearing *en banc* or a writ of certiorari, the court concluded that, "[t]he mandamus order merely enforces the prior opinion and in no way alters that opinion, which has now become final" (Pet. App. 85a-86a). In denying the stay, the court recognized that the only remaining issue "is the propriety of the mandamus order as a method of enforcing that [October] opinion" (*id.* at 86a).[5]

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[2] Contrary to the Commission's assertion (Pet. 16), the agency, not petitioners below, urged that the only form relief could take was mandamus. The Commission, however, disputed that the court had any authority to act. The United States, through the Department of Justice which had previously supported the Commission, disagreed. The Department recognized the power of the court of appeals to act in aid of its October 1981 judgment, even including the use of a writ of mandamus, but suggested that more moderate relief would be sufficient if the court determined that enforcement was necessary.

[3] This order, issued on March 30, 1982, has not been appealed.

[4] Contrary to the Commission's statement (Pet. 1), no party sought rehearing of the writ of mandamus.

[5] On March 29, 1982, Mr. Justice White granted the Commission's request for a stay of the writ of mandamus pending review (Pet. App. 99a-100a). Again the Department of Justice disassociated itself from the Commission and supported a stay only as to a single paragraph of the writ.

As reflected by its petition for a writ of certiorari, the Commission seeks to challenge the court of appeals' October decision as well as the court's granting of the writ of mandamus. Since the Commission failed to file its petition seeking the issuance of a writ in a timely fashion, this Court is without jurisdiction to review the October opinion. Insofar as the issuance of the writ of mandamus is concerned, the appeal involves only the application of settled legal principles to the facts of this particular case. It presents no issue warranting plenary consideration by this Court.

ARGUMENT

1. The time for filing a petition seeking review of the court of appeals' October opinion expired 90 days after entry of the judgment. 28 U.S.C. 2101(c). The Commission did not seek an extension of time. Inasmuch as this provision is jurisdictional, *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942), no review may be had.

The Commission itself recognized this jurisdictional bar in voting on whether to seek further review of the October decision. The votes of the Commissioners, reflected in the January 11, 1982 clearance by the Commission's Secretary, reveal the Commission's awareness that no further action could be taken with respect to the October decision (Resp. App. A, 1a-2a). No persuasive argument has been advanced that the Commission failed to appreciate the consequences of these votes.[6]

Nevertheless, in an effort to restore jurisdiction, the Commission disingenuously suggests that the writ of mandamus modified the substance of the court of appeals' earlier decision (Pet. 2, 20-21). This suggestion is without merit inasmuch as the lower court's decision,

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[6] The Commission concedes (Pet. 16, n.15) that "no court action could be taken" after the January votes.

issued in response to the petition to compel enforcement of the court's mandate, in no way disturbed or revised the substance of determinations which were settled by the October decision.[7] Moreover, issuance of the writ did not resolve any genuine ambiguities.

The court of appeals itself has stated that it was not making any substantive change to the prior decision in the writ (Pet. App. 85a-86a). Nevertheless, without any supporting references, the Commission erroneously asserts that the writ made four "changes" to the October opinion (Pet. 21-22). However, all four holdings were clearly set forth in the October opinion and the writ simply reiterated them.

As for the Commission's first point, the lower court did not make any change regarding what commodity descriptions are covered by its October opinion. In both decisions the court focused upon the transportation of household goods and bulk commodities. The writ repeats the October holding that "general commodities" authority may not automatically include those services in the absence of a statutorily-required showing that every applicant is fit, willing, and able to provide the service to be authorized (*compare* Pet. App. 32a-33a and 50a-51a with 75a-77a).[8]

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[7] As reflected by the court's opinion of February 25, 1982, (Pet. App. 66a, n.1), "[t]he time for filing an application for rehearing before the Fifth Circuit or an application for certiorari with the United States Supreme Court has expired."

[8] Contrary to the Commission's further contention, household goods and bulk commodities were not "singled out for special treatment" (Pet. 21). The court's fundamental holding was that, regardless of what kind of authority is at issue, "the statute did not dispense with the primary requirement that every carrier be 'fit, willing, and able to provide the transportation to be authorized by the certificate' " (Pet. App. 30a). *See also* Pet. App. 41a-42a. This most basic proposition of the October opinion has been followed by another court of appeals in *Ritter Transportation, Inc. v. ICC*, No. 81-2116 (D.C. Cir., decision dated July 27, 1982), citing *American Trucking Associations, Inc. v. ICC*, 659 F.2d 452, 464.

Having found that the Commission's purported policies under review were binding rules which largely exceeded its statutory mandate, the court remanded the case simply "to permit the Commission to enact rules that do not exceed the statutory bounds" (Pet. App. 10a). The writ made no change on this point (*compare* Pet. App. 72a-73a and 76a). Contrary to the Commission's conjecture (Pet. 18, 21, 25), the court of appeals never suggested that the agency may not proceed, in other circumstances, by policy statement or adjudication to establish motor carrier licensing practices. Rather, the lower court has only held that, in this proceeding where the Commission had elected to proceed by rules (Pet. App. 71a), the agency was required to bring those rules into compliance with the October decision in accordance with the Administrative Procedure Act (*id.* at 79a).[9]

The Commission also claims (Pet. 21-22) that the lower court in the writ modified its earlier decision to require applicants in restriction removal proceedings to demonstrate fitness, willingness and ability. This claim is totally unsupportable. The court made that exact finding in its October opinion when it held for the first time that the restriction removal provision of the statute "does not dispense with the primary requirement that every [applicant] demonstrate it is fit, willing and able to provide the service to be authorized" (Pet. App. 30a).[10]

The last "change" referenced by the Commission (Pet. 22) is likewise wide of the mark. As reflected in its writ of mandamus, the court agreed with the Commission that the Commission need not require a specific

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[9] Counsel's suggestion (Pet. 18) that the Commission had previously elected to proceed by "adjudication" is flatly contradicted by the continued existence to this day of the invalidated rules which have never been rescinded. The Commission may not have it both ways.

[10] The *Ritter* decision, *supra*, n.8, also confirms this fact.

showing of equipment but rather could continue to allow applicants to show fitness through evidence of successful past operations (Pet. App. 75a-76a n. 7). The court's confirmation of the appropriateness of the Commission's past practices does not constitute a change in substance from the October opinion.

In short, the lower court did no more than repeat or restate the pertinent holdings of its earlier opinion. Mere restatement of the court's prior judgment which does not change matters of substance or resolve a genuine ambiguity does not renew the time within which review may be sought.[11] *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952). As a result, the Commission's filing is untimely insofar as it seeks to have this Court review the merits of the October decision of the court of appeals.

2. Respondents submit that the only issue properly before this Court is the propriety of the writ of mandamus as a means of enforcing the court of appeals' previous October judgment and mandate. There is, however, no occasion for further review of this issue.

There is no question but that a court of appeals has the power or authority to act to protect and enforce its prior mandate. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 172 (1977); *Dugas* v. *American Surety Co.*, 300 U.S. 414, 428 (1937); *United States ex rel. Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166, 187,

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[11] Significantly, the Solicitor General has indicated to the Commission that, "No doubt the current Commission majority regrets that the agency did not seek further review of ATA, but the time for review of that decision passed months ago." Quoted by Commission Vice Chairman Gilliam, in a formal vote dated March 18, 1982 (Resp. App. B, 3a). The original memorandum was written by Abbott Lipsky, Jr., Deputy Assistant Attorney General, Antitrust Division, to the Solicitor General on March 15, 1982, well *after* issuance of the writ by the court of appeals.

194 (1867).[12] Indeed, the Commission has sought enforcement of a lower court judgment when it believed such an order was necessary to "effectuate lawful orders and judgments and to prevent them from being thwarted and interfered with by force, guile, or otherwise * * *." *See Mississippi Valley Barge Line Co.* v. *United States*, 273 F. Supp. 1, 6 (E.D. Mo. 1967), *aff'd*, 389 U.S. 579 (1968), *reh'g denied*, 390 U.S. 975 (1970).

The Commission's argument (Pet. 27) that the court of appeals failed to find that the agency was in fact not complying with the court's mandate is specious. In issuing the writ, the court acted only after affirmatively finding:

> [T]hree months after the rendition of our prior opinion, the ICC has not fully complied with it. Yet it is apparently continuing to act in many cases without applying the principles that are exacted by the Motor Carrier Act, as interpreted by our prior opinion. Litigation in scores of cases is not adequate remedy for an agency's failure to carry out its statutory duties. Therefore, there is no adequate alternative remedy. *Allied Chemical Corp.* v. *Daiflon*, 449 U.S. 33, 101 S. Ct. 188, 190, 66 L. Ed. 2d 193 (1980). (Pet. App. 71a).[13]

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[12] The court of appeals relied upon numerous decisions by this Court and several circuit courts in concluding it needed to act (Pet. App. 69a-70a). As the court noted:

> Indeed, the ICC concedes that mandamus is the appropriate remedy to enforce the judgment of an appellate court, itself correctly citing, *inter alia*, *Will v. United States*, 389 U.S. 90, 95, 88 S. Ct. 269, 273, 19 L. Ed. 2d 305, 310 (1967), and the cases cited *supra*. It contests only the adequacy of the showing made to warrant issuance of the writ. (*Id.* at 70a).

[13] The Commission's assertion (Pet. 27), that the court of appeals found only that the agency "appeared" that it might be violating the mandate, is a play on words. Petitioners below argued, and

The Commission further contends that the writ of mandamus impermissibly intrudes on its discretion in future licensing proceedings (Pet. 28-29) and on its choice of how to proceed on remand (*id.* at 29-30). These allegations are groundless. The writ of mandamus runs only to the most basic of ministerial duties—compelling positive compliance with the court's prior judgment and mandate interpreting the governing statute.[14] Because the Commission has no discretion to ignore the October opinion which it failed to appeal, there can be no improper intrusion caused by the writ which merely enforces that opinion.

Nor does the writ of mandamus improperly interfere with the Commission's discretion on remand. The writ was issued to command the Commission to take action on invalidated "policies" never rescinded, which the court found to be beyond the Commission's statutory mandate (Pet. App. 10a, 26a-29a, 47a-49a). The court was concerned that the Commission's failure to "effectuate those parts of our opinion requiring changes in its published rules" would create substantial confusion for the public as to what rules should be followed (Pet. App. 71a). Consequently, the court evaluated the Commission's action and correctly found:

> Because the ICC has promulgated rules never rescinded, it has obviously chosen not to interpret the requirements of the Motor Carrier Act on a case by case basis. (*Ibid.*).

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the court of appeals agreed, that the Commission's violations of the previous judgment and mandate were "apparent" or obvious on their face (*see* Pet. App. 71a). Ironically, the Commission used the word "apparent" to mean "obvious" in its Petition (Pet. 5).

[14] The Commission's related contention (Pet. 29) that the writ is inconsistent with the court's subsequent denial of other relief is without merit. The court consistently refused to interfere in individual licensing adjudications, either on a prospective *or* a retroactive basis (*see* Pet. App. 98a). Its distinct findings as to each request for enforcement were based on a consistent and proper reading of the case law.

Thus, in directing the Commission to proceed by rulemaking, the court did no more than tailor its remedy to the course upon which the Commission had chosen to embark.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDICES

APPENDIX A

OFFICE OF THE SECRETARY

Clearance Unit

No. 82-5

Re: American Trucking Associations, Inc., et al. v. Interstate Commerce Commission and United States of America, U.S.C.A., 5th Cir., Unit A, No. 81-4026

Ex Parte No. 55 (Sub-No. 43A), Acceptable Forms of Requests for Operating Authority (Motor Carriers and Brokers of Property)

Ex Parte No. MC-142 (Sub-No. 1), Removal of Restrictions from Authorities of Motor Carriers of Property

Prior G.C. Memo Nos. 81-357, 81-366, 81-368, 81-383, 81-412, 81-434, 81-440, 81-454 and 82-4

(G.C. File No. 4367)

January 11, 1982

MEMORANDUM TO
ACTING GENERAL COUNSEL RUSH:

On *January 8, 1982*, the Commission failed to reach a majority concerning the disposition of your recommendation not to seek an extension of time for filing a petition for a writ of certiorari circulated January 7, 1982, therefore an extension may not be sought.

Chairman Taylor and Commissioner Clapp would not seek an extension of time for filing a writ of certiorari.

Vice Chairman Gilliam would seek an extension of time of 30 to 60 days for filing a writ of certiorari.

Commissioner Gresham would seek from the Supreme Court an extension of time in which the Commission may file a request for certiorari.

A copy of each vote is attached.

KATHY LINK

cc: All Commissioners
Secretaary Mergenovich
Director Hardy (with copy of votes)
Director Hatton
Director Dahlgren

APPENDIX B

OFFICE OF VICE CHAIRMAN GILLIAM

G.C. No. 82-98

Re: American Trucking Associations, Inc., et al. v. Interstate Commerce Commission and United States of America, U.S.C.A., 5th Cir., Unit A, No. 81-4026

Ex Parte No. 55 (Sub-No. 43A), Acceptable Forms of Requests for Operating Authority (Motor Carriers and Brokers of Property)

Ex Parte No. MC-142 (Sub-No. 1), Removal of Restrictions from Authorities of Motor Carriers of Property

March 18, 1982

MEMORANDUM TO CHAIRMAN TAYLOR:

I vote to approve the draft notice submitted by the Office of Proceedings. However, I feel that the General Counsel, in order to enlist the support of the Solicitor-General's Office, recommends that the Commission forego several lines of attack against the 5th Circuit's mandamus order.

While I realize that aid of the Solicitor-General is virtually indispensible to an agency seeking to litigate before the Supreme Court the Commission should be apprised of the Hobbesian choice before it. This choice is best illustrated by the memorandum prepared for the Solicitor-General by the Antitrust Division. As the Division states: "No doubt the current Commission majority regrets that the agency did not seek further review of ATA, but the time for review of that decision passed months ago."

/s/ R. E. G.
GILLIAM

cc: All Commissioners
Clearance Unit
Office of the General Counsel